No. _____

In The
Supreme Court of the United States

REHABILITATION CENTER AT
HOLLYWOOD HILLS, LLC,

Petitioner,

v.

STATE OF FLORIDA,
AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari
To The Fourth District Court Of Appeal
For The State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a Licensee facing revocation, the most severe punishment possible, the Licensee has a fundamental due process right to meaningful notice and opportunity to be heard. By legislation, the Agency has to consider causation, substantial causes, and mitigating evidence, and cannot cabin evidence within a strict-liability analysis. Against that legislation with its governing rules and regulations granting pre-hearing discovery, the Licensee was precluded from discovery and presenting evidence in key defenses showing the nursing home deaths were legally, proximately caused by the failures of others to properly plan, prepare, and manage a natural-hazards emergency, and to take responsive action despite those third-parties' promises to do so. The Licensee was also precluded from presenting evidence of another key defense: that it followed the same standard of care that virtually every other nursing home in the state followed. Despite legislative mandate that a license not be revoked under a strict-liability rationale and despite no notice of strict liability in the charging documents, the Administrative Law Judge ("ALJ") and the Agency revoked Petitioner's license without considering causation (deemed not relevant), and imposed strict liability on the basis that the decedents were the Licensee's residents when the Hurricane barreled up Florida.

The questions presented, therefore, are:

1. Does the refusal to consider causation, substantial causes, and mitigating evidence—central to this licensure revocation—violate the Due Process Clause of the Constitution?

QUESTIONS PRESENTED—Continued

2. Does the imposition of strict liability without notice of this standard to the Licensee violate the Due Process Clause?

3. Does the denial of discovery into causation and mitigating circumstances preclude the Licensee's "opportunity to be heard" and violate the Due Process Clause?

STATEMENT OF RELATED CASES

Agency for Health Care Administration v. Rehabilitation Center at Hollywood Hills, LLC, State of Florida, Division of Administrative Hearings ("DOAH"), DOAH Case No. 17-5769, Recommended Order entered November 30, 2018.

State of Florida, Agency for Health Care Administration v. Rehabilitation Center at Hollywood Hills, LLC, State of Florida, Agency for Health Care Administration ("AHCA"), AHCA Case No. 2017011570, AHCA Rendition No. AHCA-19-0038, Final Order adopting Recommended Order and revoking Rehabilitation Center at Hollywood Hills, LLC's ("RCHH") license entered January 4, 2019.

Rehabilitation Center at Hollywood Hills, LLC v. *State of Florida, Agency for Health Care Administration,* Fourth District Court of Appeal, for the State of Florida, Case No. 4D19-293, Opinion affirming *per curiam* the Agency's Final Order, was entered on February 13, 2020, and rendered final by Order denying Rehabilitation Center at Hollywood Hills, LLC's motion for rehearing, rehearing *en banc*, clarification, certification as a question of great importance on which to seek review in the Supreme Court of Florida under certification jurisdiction, and request for written opinion on which to seek review in the Supreme Court of Florida under conflict jurisdiction, on April 2, 2020.

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OPINIONS BELOW

Florida's Agency for Health Care Administration ("AHCA" or "Agency") revoked the license of the Rehabilitation Center of Hollywood Hills ("RCHH" or "Licensee") after some of its residents died in the days following a large-scale weather event, Hurricane Irma. The Agency's Final Order revoking RCHH's license on January 4, 2019, is reproduced in the Appendix at App. 2. The Fourth District Court of Appeal for the State of Florida's February 13, 2020, Decision affirming *per curiam* the Agency's Final Judgment, is reported at *Rehab. Ctr. at Hollywood Hills, LLC v. Agency for Health Care Admin.*, No. 4D19-293, 2020 Fla. App. LEXIS 1876, 2020 WL 738277 (Fla. Dist. Ct. App. Feb. 13, 2020), and reproduced in the Appendix at App. 1. The Fourth District Court of Appeal's April 2, 2020, Order denying the Licensee's motion for rehearing, rehearing *en banc*, clarification, certification, and request for written opinion, is reported at Order, *Rehab. Ctr. at Hollywood Hills, LLC v. Agency for Health Care Admin.*, No. 4D19-293 (Fla. Dist. Ct. App. Apr. 2, 2020), and reproduced in the Appendix at App. 118.

STATEMENT OF JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1257(a). That section provides that "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari, . . . where

any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a). Here, the Florida Fourth District Court of Appeal is "the highest court of a State in which a decision could be had." *See Grovey v. Townsend*, 295 U.S. 45, 47 (1935), *overruled in part on other grounds by Smith v. Allwright*, 321 U.S. 649 (1944) (highest court in which decision could be had may include intermediate appellate court); *Fisher v. Carrico*, 122 U.S. 522, 527 (1887) (same); *Riddle v. Kemna*, 523 F.3d 850, 853 (8th Cir. 2008), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012); *see also Koon v. Aiken*, 480 U.S. 943 (1987) ("Identifying the state court of last resort requires an examination of the particular state court procedures."). The highest available court of the state must come to a final decision that establishes legal rights and relationships.[1] *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18, 24

[1] This Court grants certiorari in appeals yielding unpublished decisions, many with no written opinions at all. *See*, *e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2554–55 (2015) (reversed and remanded 526 F. App'x 708 (8th Cir. July 31, 2013) (unpublished)); *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000) (affirmed 188 F.3d 501 (4th Cir. Aug. 20, 1999) (unpublished, with only "Affirmed.")); *Old Chief v. United States*, 519 U.S. 172 (1997) (reversed and remanded 56 F.3d 75 (9th Cir. May 31, 1995) (unpublished, with only "Affirmed in part. Vacated in Part.")); *Williamson v. United States*, 512 U.S. 594 (1994) (vacated and remanded 981 F.2d 1262 (11th Cir. 1992) (unpublished, "Affirmed. See Circuit Rule 36-1.")); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (reversed and remanded 976 F.2d 733) (6th Cir. 1992) (unpublished, with only "Affirmed.")).

(1949); *Mkt. St. Ry. Co. v. R.R. Comm'n of State of Cal.*, 324 U.S. 548 (1945); *see also Fla. v. Thomas*, 532 U.S. 774, 777 (2001).

That happened here. Under Article V, Section 3(b) of the Florida Constitution, the Florida Fourth District Court of Appeal issued the final decision that could be had. AHCA issued a statement of deficiencies on September 22, 2017. On October 3, 2017, AHCA issued an administrative complaint seeking permanent revocation of RCHH's license and imposition of fines. On November 30, 2018, after a hearing, the ALJ issued a recommended order. AHCA entered its final order revoking RCHH's license on January 4, 2019. RCHH timely appealed to Florida's Fourth District Court of Appeal, which issued its decision affirming *per curiam* without written opinion AHCA's final judgment on February 13, 2020. Petitioner RCHH timely moved the Fourth District for rehearing, rehearing *en banc*, clarification, for certification to the Supreme Court of Florida to review as a question of public importance per the Florida Constitution, and requested a written opinion to seek conflict jurisdiction review in the Supreme Court of Florida per the Florida Constitution, which the Fourth District denied on April 2, 2020, in its entirety. Because the Florida Supreme Court holds that it lacks jurisdiction to consider *per curiam* decisions without written opinions by Florida's District Courts of Appeal, *Callendar v. State*, 181 So. 2d 529, 532 (Fla. 1966); *Persaud v. State*, 838 So. 2d 529, 533 (Fla. 2003); *Gandy v. State*, 846 So. 2d 1141, 1143 (Fla. 2003); *Jenkins v. State*, 385 So. 2d 1356, 1358-59 (Fla. 1980), RCHH, by Florida law, had no further rights available

to call upon and seek further review by the Florida Supreme Court. Accordingly, the Fourth District Court of Appeal was by law the highest court in Florida wherein a decision could be had, just as 28 U.S.C. § 1257 requires.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

Section 1 of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

INTRODUCTION

This is a case in which Florida's Agency for Health Care Administration exercised the most extreme punishment available to long-term care facilities, the regulatory "death penalty" of license revocation, against RCHH after some of its residents died in the aftermath of Hurricane Irma in 2017. This was done without

affording the Licensee the due process to which it was legally entitled: full and fair discovery and full and fair hearing that included a meaningful opportunity to offer evidence, argument, and afforded consideration pertinent to the applicable law and the Licensee's available defenses.

This petition should be granted to correct these errors that conflict with the long-established due process requirements of this Court and federal circuit courts. From prehearing discovery through the final order revoking RCHH's license, the ALJ rejected discovery, argument, and evidence showing the deaths at RCHH were caused by the failures of others to take responsive action despite their promising to do so and on which assurances RCHH reasonably relied. This was mitigating and exculpatory evidence that the Licensee has a fundamental due process right to adduce, present, and have considered, even in the strongest of political winds. Further, the ALJ protected law enforcement officials from giving the Licensee certain testimony and document production through assertions of "ongoing criminal investigation," while allowing those officials to selectively disclose the information they wanted to disclose. These errors materially impaired the fairness of the proceeding. These rendered the Licensee defenseless. These resulted in a manifest injustice and violation of the Licensee's right to meaningful due process.

This petition should also be granted to ensure that the nation's long-term care facilities are given the process due them even in times of extraordinary

circumstances and acts, such as extreme weather events and novel viruses presenting enormous challenges to keep elderly residents safe and healthy. In the aftermath of this Hurricane that caused widespread power outages across Florida, nursing homes and others throughout the state were left without air conditioning in the Florida September, some for weeks, while the former Governor and the state emergency management system and utility companies struggled and fumbled to respond to the critical need for power restoration at facilities caring for frail, elderly residents. The Hurricane's wrath exposed the disturbing reality that Florida's emergency management system was woefully inadequate and ill-prepared to handle the scale of this event.

The rule of law in times of natural disaster cannot sustain itself without loyalty to its requirements, including indispensable due process. Every branch of government, its officers, and adjudicating agencies share the responsibility to act in accordance with the rule of law and secure the rights of those whom they govern. This Court stands in the unique and time-honored position of being the only court that can ensure the rule of law's continuity, even in times of frenzied political chaos triggered by natural disasters, terrorist threats, pandemics, or the like.

Novelty presents the proverbial "double-edged sword," in that the uniqueness of an extreme weather or illness event combined with limited experience preventing or treating such an event leave the standard of medical care unclear. As a result, care providers are

left to make critical decisions that lack precedent and established standards at the very same time that they are exposed to more uncertainty and potential liability. The statutes under which RCHH was charged are broad, general, and fail to give notice of what such a facility must do in extraordinary natural disasters and novel events. In times of the extraordinary and novel, triggering heavy political pressures, procedural due process safeguards are more likely to be slackened or altogether not followed, presenting the greater risk of due process violations and conflicts. As just one of many examples, imposing a false strict liability standard on providers of the sick and elderly in the very pandemic we are facing today percolates into the unwillingness of those providers and of long-term care facilities to test all their residents for fear that a positive COVID-19 case or more would subject them to citations, fines, or license revocation, irrespective of the measures they took and continue to take to keep their residents healthy. The retaliatory strict liability artificially imposed on this Licensee has a chilling effect on all care facilities and providers and can materially hinder essential care facilities from providing the best possible care and needed transparency in these novel, extraordinary times.

STATEMENT OF THE CASE

Before Hurricane Irma, RCHH had a reputation as a good 152-bed nursing home. *See* T.1269. Compliant with Florida nursing home licensure requirements,

RCHH maintained a Comprehensive Emergency Management Plan ("CEMP"). R.3004–05. The Broward County Division of Emergency Management approved RCHH's CEMP, every single year. *Id*. From September 5–9, 2017, RCHH also participated in industry hurricane preparedness calls held by state and local emergency management officials, the Florida Health Care Association, and the former Governor. R.3005. Nursing homes were given emergency contact numbers, including the personal number of then-Governor Scott, and were encouraged to call directly with storm-related problems. *Id*.

RCHH also took preparatory measures exceeding state and federal regulations. *See* R.3004–07. Those included structurally preparing the facility for extreme weather, including renting spot coolers, purchasing fans, initiating an Alpha/Bravo staffing model used by hospitals, and preemptively lowering the temperature in the event of a power outage. R.3005–06. RCHH also secured sufficient food, water, ice, and patient-care supplies, closely monitored evacuation orders, and satisfied all other state and federal requirements. *Id*.

On September 9, 2017, Hurricane Irma made landfall as a Category 4 storm in the Florida Keys. It traveled up the length of the Florida peninsula and tore everything in or near its path. Seven million-plus Floridians lost power. Some without power for weeks. More than 245 nursing homes were also left without power or with inadequate cooling. T.2228–47; 2440-46; 3712–19.

After the Hurricane, RCHH still had regular electric and back-up power, but lost power to its air conditioning ("AC") chiller. That was Sunday afternoon, September 10, 2017. R.3003–04. Backup AC power was not legally required of nursing homes at that time. However, RCHH was attached to and shared its chiller power source with Larkin Community Hospital Behavioral Services (the "Hospital"), a Priority 1 restoration facility. R.3003.

Under the accepted standard of care for nursing homes with frail and elderly residents needing 24-hour care to "shelter in place," RCHH did precisely that—"shelter in place"—while monitoring its residents, as Florida Power & Light ("FP&L") assured RCHH, in multiple recorded calls, that FP&L understood RCHH was a priority facility and help was on the way. R.3007–08.

Around 1:00 p.m. on Tuesday, September 12, a 99-year-old resident was taken by EMS to the hospital. R. 3015–16. Around 3:00 a.m., on Wednesday, September 13, 2017, a resident began showing signs of respiratory distress. R.3017–18; T.3995–96. Earlier, she'd been placed in the hallway directly in front of a spot cooler to keep comfortable, as she was obese and had multiple co-morbidities. *Id.* 911 was called and EMS took her to the hospital. *Id*. Other residents on the second floor of the facility began showing signs of distress, between 4:00 and 6:30 a.m. R.3018–22; T.1142–43, 1202, 1207–08. Staff called the Director of Nursing, who instructed second-floor residents be moved to the cooler, first floor, which staff did.

RCHH was not ordered to evacuate until September 13. R.3023–25. RCHH staff began moving residents downstairs and, while doing so, EMS and Memorial Regional Hospital ("MRH") proceeded to evacuate the facility. R.3023–25. AHCA surveyors did not arrive at the facility until around noon, after the evacuation was complete. R.3028; T.1557, 1562.

The loss of AC had arisen from a dislodged fuse on a Florida Power & Light ("FP&L") pole. *See* R.3006–07. Despite RCHH's many efforts for repair and repeated contacts with FP&L and the Florida Governor's Office, including contacts with then-Governor Rick Scott's mobile phone that he'd earlier provided to call for help, and despite multiple assurances that restoration would be "escalated" and help was on the way (in recorded calls), FP&L did not arrive to reinsert the Licensee's fuse (a quick half-hour fix) until September 13, 2017. R.3006–07, 3011–12; 22645. That repair was made several hours after the facility had finally been ordered to and had already evacuated.

What ensued was a media-frenzied, politically charged milieu. The former Governor directed AHCA to take immediate action against the Licensee RCHH to revoke its license. R.2878–79. That same day, before any investigation had begun, the former Governor directed AHCA to issue an Emergency Moratorium on Admissions. R.6878. The next day, before AHCA even had possession of a single resident record, the former Governor ordered that RCHH's Medicaid certification be terminated. R.2811. Over the next several days, Governor Scott and several other politicians held

multiple press conferences, telling a frenzied media that the Licensee RCHH would be held fully accountable. R.13708-14770.

AHCA swiftly issued a "statement of deficiencies" on September 22, 2017 [R.3703], and on October 3, 2017, issued an administrative complaint seeking permanent revocation of RCHH's license and imposition of fines. R.61–124. The administrative complaint consisted of four counts: 1) failure to comply with physical environment requirements [§ 400.141(1)(h), Fla. Stat.]; 2) failure to comply with resident rights to adequate and appropriate health care [§ 400.022(1)(l)]; 3) intentional or negligent act materially affecting the health and safety of residents [§§ 400.102(1), (4), Fla. Stat.]; and 4) licensure revocation [§§ 400.121(1), (3)(c); 408.815(1)(b)-(e), Fla. Stat.]. RCHH filed its "petition for formal administrative hearing" [R.127–203]; the final hearing was conducted January 29–February 1, March 1, 2, 5–9, 19–22, 26, 28–29, and May 24–25, 2018.

Before the hearing, RCHH sought and was refused discovery from the Executive Office of the former Governor and from FP&L. The discovery concerned key issues in the revocation proceeding: the availability and offering of generators to nursing homes, decisions to not issue evacuation orders or belatedly issue them, the government's communications with FP&L concerning power restoration to nursing homes, the requirements of and compliance with Florida's Comprehensive Emergency Management Plan (CEMP), and the circumstances at other similarly situated Florida

nursing homes. *See*, *e.g.*, R.439–56, 672–79. RCHH was also refused discovery into FP&L's guidelines, policies, and procedures pertaining to restoration of power, and whether FP&L had even followed them, given RCHH and the attached hospital were an acknowledged Priority 1 restoration. R.498–506, 664–71.

The ALJ did allow at hearing, however, selective testimony of Lieutenant Jeff Devlin, lead investigator of the Hollywood Hills Police Department. When Lt. Devlin had appeared for deposition, he refused multiple times to answer RCHH's questions and did not produce RCHH's requested documents, and at the hearing he also refused to answer numerous RCHH questions put to him. *See* R.1326, 1341–42, 1366–67, 1376; T.829–32, 886–87. The issues the investigator chose to testify about, however, concerned key issues surrounding the whereabouts of a temperature log maintained by the facility's plant manager, temperatures in the facility after the evacuation, selective use of photographs taken by police of surface temperature readings after the evacuation, and photographs regarding the venting of spot coolers into the ceiling. *See* R.1326, 1341–42, 1366–67, 1376; T.829–32, 886–87. Lt. Devlin admitted he and others made strategic choices about what to disclose and what to withhold, and refused to disclose any information about even the nature of the evidence withheld. T.875–77.

The ALJ issued a November 30, 2018 recommended order. R.2997. That order and AHCA's final order relied on the above pieces of evidence, much uncorroborated hearsay, and RCHH's crippled ability

to rebut them. R.1155, 1314, 1622, 1686; T.813–94. The recommended order admonished RCHH for attempting to "shift the blame" by "finger pointing," concluding such causation and mitigating evidence and defenses were "irrelevant" to the issues:

> Throughout this proceeding, RCHH argued that its responsibility, if any, for the patient deaths, should be mitigated by the inactions of others. As set forth in the Order entered in this proceeding on November 22, 2017, the focus of this proceeding is on whether RCHH met its obligation to provide a safe environment and appropriate health care to its residents. The efforts by RCHH to shift the blame by trying to point the finger at other entities is irrelevant to the issues before this tribunal.

R.3067.

AHCA entered its Final Order revoking RCHH's license on January 4, 2019. R.3255. AHCA's basis: that residents were or had been within the nursing home. AHCA rejected all consideration of third-party conduct and causation regarding the damage suffered by those residents and consideration of mitigating evidence of whether RCHH's conduct was reasonable under the circumstances, despite no standards of care specific to such a novel, widespread situation and despite assurances, in recorded calls, that FP&L's help was on its way. *See*, *e.g.*, R.2997–3090, 3255–65.

RCHH appealed to Florida's Fourth District Court of Appeal, which issued the decision affirming *per curiam* the final order on February 13, 2020. RCHH

timely moved in the Fourth District for rehearing, rehearing *en banc*, clarification, certification to the Florida Supreme Court, and/or for a written opinion, which motions were denied on April 2, 2020.

REASONS FOR GRANTING THE PETITION

I. Refusal to allow the Licensee to discover and offer key rebuttal evidence and refusal to consider evidence and argument of causation of the residents' harm, without notice of imposed strict liability, denied the Licensee the due process to which it was entitled in a licensure revocation proceeding. The decision below affirming those violations conflicts with due process precedent and the laws of the United States.

The touchstone of due process is protection from the arbitrary action of government from the erroneous or mistaken deprivation of life, liberty, or property by guaranteeing the application of fair procedures. *See* U.S. Const. Amend. V; U.S. Const. Amend. XIV, § 1; *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). The grant of a license is a vested property and liberty interest—the revocation of which impairs one's livelihood—protected by due process. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (superseded by statute); *Bell v. Burson*, 402 U.S. 535 (1971); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 339 (1969).

The fundamental principles and requirements of due process apply to quasi-judicial administrative proceedings, particularly when a property right is subject, as here, to a direct and material infringement. *See Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975); *B.K. ex rel. Kroupa v. 4-H*, 877 F. Supp. 2d 804 (D.S.D. 2012), *aff'd*, 731 F.3d 813 (8th Cir. 2013). Because the Licensee RCHH has a vested property and liberty interest in the retention of its license, the Agency cannot deprive the Licensee of its license unless it has provided and followed procedural due process protections. *See Goldberg*, 397 U.S. at 262; *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102 (1963). That right to due process is absolute; it doesn't depend on the substantive claims' merits. *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *see also Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915) ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.").

The cardinal or ultimate test of the presence or absence of due process of law in the administrative context is whether the rudiments of traditional fair play were present—a fair trial in a fair tribunal. *See In re Murchison*, 349 U.S. 133, 136 (1955); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Withrow*, 421 U.S. at 46; *Swift & Co. v. United States*, 308 F.2d 849, 852 (7th Cir. 1962); *see also McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979). This Court expounded on the importance of safeguarding "the rudimentary

requirements of fair play" in adjudicatory administrative hearings to maintain "public confidence in the value and soundness of this important governmental process" in *Morgan v. United States*, 304 U.S. 1, 14–15 (1938). The extent to which procedural due process must be afforded—i.e., the process due—is influenced by the extent to which one may be "condemned to suffer grievous loss." *Goldberg*, 397 U.S. at 262–63 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

RCHH was denied due process. The denial of discovery for use in the administrative hearing, denial of the right to introduce rebuttal evidence, and refusal to consider evidence of causation, instead imposing strict liability of which notice was not given, denied RCHH of the opportunity to know the true claims lodged by ACHA and to meet them. The loss here is among the gravest deprivations of long-term care facilities. The permanent revocation of the license to operate is the death knell of a business or profession. *See Goldberg*, 397 U.S. at 262 n.8; *Bell*, 402 U.S. 535; *Sniadach*, 395 U.S. at 339. The Fourth District's affirmance of this final order relegated the inalienable constitutional right to due process of long-term care facilities to mere

pliable rights molded by political pressures during mass tragedies in conflict with binding precedent.

Important to underscore, an agency wears three hats, not one: the accuser, a party to the proceeding, and the ultimate decision-maker. While states have a strong interest and duty to protect the life, health, and safety of residents, including long-term care residents, the state of Florida, like the federal system, has also recognized and affirmed the valuable and substantial interest in a facility's retention of licensure and that such licensure revocation should only occur after due process. In the face of natural disasters, such as hurricanes or pandemics, in which RCHH and other long-term-care facilities follow established industry procedures and practices (to the extent there are "established" standards under novel circumstances) and employ all available resources to care for residents around the clock, these due process protections are even more important amidst immense political pressure on governments to hold someone accountable. The chilling effect of the imposition of strict liability, contrary to the statutory standards and procedures that are supposed to control, erodes public confidence in the governmental process and discourages the beneficial actions that care facilities might and should take in unprecedented or novel circumstances.

A. The process due the Licensee includes the right to discovery to protect its right to adequately prepare and present rebuttal evidence. Refusal of such discovery deprived the Licensee of due process. The decision affirming that conflicts with due process precedent.

The refusal to allow the Licensee meaningful discovery violates the fundamental due process protections guaranteed to entities and individuals facing license revocation in conflict with the long-standing precedent on the subject. First, the purpose of the Due Process Clause is "to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978); *see also In re Ruffalo*, 390 U.S. 544, 552 (1968); *Ex Parte Wall*, 107 U.S. 265, 271 (1883); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974); *Goldberg*, 397 U.S. at 267–78. Second, the hearing must be "meaningful," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case." *Mullane*, 339 U.S. at 313.

Third, a party is entitled to know the issues on which a decision will turn, the standards by which it will be judged, and to be apprised of the factual material on which the agency relies for the decision so that the party may rebut it. *See Bowman Transp., Inc.*, 419 U.S. at 288 n.4; *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *Mullane*, 339 U.S. at 313 (1950); *Morgan v. United State*s, 304 U.S. 1, 18–19

(1938); *see also Rodale Press, Inc. v. F.T.C.*, 407 F.2d 1252, 1256–57 (D.C. Cir. 1968); *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981); *Pub. Serv. Comm'n of Ky. v. F.E.R.C.*, 397 F.3d 1004, 1012 (D.C. Cir. 2005); *NLRB v. Tennsco Corporation*, 339 F.2d 396, 399–400 (6th Cir. 1996); *Commissioner of Internal Revenue v. West Production Co.*, 121 F.2d 9, 11 (5th Cir.), *cert. denied*, 314 U.S. 682 (1941).

Fourth, "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc.*, 419 U.S. at 288 n.4 (citing *Ohio Bell Telephone Co.*, 301 U.S. at 302–03; *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 289–90 (1924)); *see also Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981); *United Gas Pipe Line Co. v. FERC*, 597 F.2d 581, 586–87 (5th Cir. 1979). This requirement ensures the parties' right to present rebuttal evidence on all matters decided at the hearing. *See Bowman Transp., Inc.*, 419 U.S. at 288 n.4; *Hatch*, 654 F.2d at 835; *Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1012.

Further, state laws may create more "liberty interests" that the Fourteenth Amendment also protects. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989); *Bagley v. Rogerson*, 5 F.3d 325, 328 (8th Cir. 1993). In procedural due process claims, if a state statute gives, as it does here, "specific directives to the decision maker that if the [statute's] substantive predicates are present, a particular outcome must follow," a "liberty interest" has been created and the Fourteenth Amendment protects it. *Thompson*, 490 U.S. at

463; *Bagley*, 5 F.3d at 328; *Meis v. Gunter*, 906 F.2d 364, 368–69 (8th Cir. 1990). What this means under the notice element of due process is that those affected by rules of an administrative board are entitled to depend on the board's use of and adherence to those rules; otherwise, any person relying on rules not followed is misled and surprised, making this due process a sham. *See McClelland*, 606 F.2d at 1286. As the Eighth Circuit explained, "[i]f a state law gives me the right to a certain outcome in the event of the occurrence of certain facts, I have a right, by virtue of the Fourteenth Amendment, to whatever process is due in connection with the determination of whether those facts exist." *Bagley*, 5 F.3d at 328.

That this was an administrative, rather than criminal, proceeding is not a distinction diluting those rights. Administrative agencies must still abide by their own rules, including those that provide for discovery, to avoid otherwise violating the due process clause. *See McClelland*, 606 F.2d at 1286; *Jones Total Health Care Pharmacy, LLC v. Drug Enf't Admin.*, 881 F.3d 823, 834–35 (11th Cir. 2018); *Pac. Gas & Elec. Co. v. F.E.R.C.*, 746 F.2d 1383, 1388 (9th Cir. 1984); *P.S.C. Resources, Inc. v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978); *NLRB v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir. 1976); *see also Maul v. State Bd. of Dental Examiners*, 668 P.2d 933, 937 (Colo. 1983); *cf. Tasker v. Mohn*, 267 S.E.2d 183, 189 (W. Va. 1980). These proceedings are very much treated as being quasi-judicial ones, in which "parties may obtain discovery through the means and in the manner provided in Rules 1.280

through 1.400, Florida Rules of Civil Procedure." The Florida Administrative Procedure Act expressly provides for the appointment of a hearing examiner, rules of evidence, oath, subpoena power, and deposition evidence. *See*, *e.g.*, Fla. Admin. Code Rule 28-106.206, Discovery; Rule 28-106.212, Subpoenas; Rule 28-106.213, Evidence.

Moreover, Licensee RCHH has the statutory legal right to "present factors in mitigation of revocation, and the agency may make a determination not to revoke a license based upon a showing that revocation is inappropriate under the circumstances." § 400.121, Fla. Stat.; *see also Bridlewood Grp. Home v. Ag. for Persons with Disabs.*, 136 So. 3d 652, 656–57 (Fla. Dist. Ct. App. 2013). RCHH also has the right to present evidence and argument on all issues involved and to conduct cross-examination and submit rebuttal evidence under § 120.574, Fla. Stat. Licensee RCHH was denied its clear rights to meaningful discovery and rebuttal evidence. The Agency did not follow these rules, rules on which RCHH relied, and, in disregarding them, misled and surprised RCHH, making this facet of the requisite due process a sham.

Even beyond these specific statutory and rule-based guarantees, agencies are bound to ensure that their procedures meet basic due process requirements. *McClelland*, 606 F.2d at 1285–86. Even if Florida's statutes and rules did not specifically mandate certain discovery (they do), meaningful discovery is still required to be granted if, in the particular situation, "a refusal to do so would so prejudice a party as to deny

him due process." *McClelland*, 606 F.2d at 1286; *In re Herndon*, 596 A.2d 592, 595 (D.C. App. 1991); *see also Sw. Airlines Co. v. Transportation Sec. Admin.*, 554 F.3d 1065, 1074 (D.C. Cir. 2009); *see also Shively v. Stewart*, 421 P.2d 65, 67–68 (Cal. 1966); *In re Tobin*, 628 N.E.2d 1268, 1271 (Mass. 1994). As already discussed, the prejudice here is manifest.

Adjudications, after all, test evidence that determine guilt or innocence upon a record in a formal adversarial proceeding to evaluate whether that evidence sustains the charges brought. *See*, *e.g.*, *Genuine Parts Co. v. Fed. Trade Comm'n*, 445 F.2d 1382, 1387–88 (5th Cir. 1971). Adjudications are based on proof of facts and affect substantial rights. *See* Fla. Stat. § 120.57(1); *see also Chestnut v. Sch. Bd.*, 378 So. 2d 1237, 1238 (Fla. Dist. Ct. App. 1979). Therefore, during these adjudicatory proceedings, especially license revocation proceedings, discovery rights are among the most important to non-agency parties like RCHH. *See*, *e.g.*, *NLRB v. Rex Disposables, Div. of DHJ Indus., Inc.*, 494 F.2d 588, 592 (5th Cir. 1974) (reaffirming doctrine that when good cause is shown, discovery should be permitted so that rights of all parties may be properly protected in proceedings before National Labor Relations Board); *Firestone Synthetic Fibers Co. v. NLRB*, 374 F.2d 211, 214 (4th Cir. 1967) (recognizing agency decision not to provide discovery may result in unfairness); *see also Shively*, 421 P.2d at 67–69 (ordering certain discovery be made available to physician in disciplinary proceeding that could have resulted in loss of his license, making analogy to criminal law); *Maul*, 668

P.2d at 937. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269–70 (citing *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93–94 (1913); *Willner*, 373 U.S. 103–04; *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue")).

Regardless of the source of the rights, the laws recognize that the right to discovery is vital to ensure a fair adjudicatory hearing in an administrative procedure to revoke a license. *See*, *e.g.*, *McClelland*, 606 F.2d at 1285–86. The ALJ denied RCHH meaningful discovery and evidence concerning key defenses to show that the causes of the resident deaths were due to the failures of others to take responsive action despite promising to do so, improperly precluded and prohibited discovery of evidence analyzing state-wide death data of nursing home residents to show the events at RCHH and its actions were not unique and RCHH was being singled out and punished for political reasons, and allowed selective disclosures by law enforcement. These were the denial of due process in conflict with textbook basic notice and opportunity-to-be heard principles required by the Constitution and recognized by this Court and multiple Circuit Courts of Appeals.

The U.S. Court of Appeals for the D.C. Circuit illustrated these principles in *McClelland v. Andrus*, 606 F.2d 1278 (D.C. Cir. 1979) (superseded on other grounds by statute as stated in *Curran v. Dep't of the Treasury*, 11 M.S.P.R. 597 (M.S.P.B. May 25, 1982)), in which denial of discovery and ability to produce evidence were deemed to violate due process. The denial of discovery to RCHH falls under this line of precedent. In *McClelland*, B. Riley McClelland, a former employee of the Department of Interior National Park Service, sued in federal district court for restoration of his job, challenging the merits of the Civil Service Commission's Appeals Review Board ("ARB") action upholding the National Park Service's decision to remove him, and the Secretary of Interior's refusal to provide him with a copy of a report on the personnel management practices of his supervisor at Glacier National Park for use in the administrative proceedings. 606 F.2d at 1281–85.

After his removal, at his hearing before the Federal Employees Appeals Authority ("FEAA"), Mr. McClelland requested a copy of the Secretary of Interior's report on his superintendent's management practices that was prepared pursuant to the ALJ's earlier recommendation. *McClelland*, 606 F.2d at 1284–85. The hearing examiner held that he had no power to subpoena it and that it need not be produced because it had not been relied upon in the adverse action against Mr. McClelland. *Id.* The FEAA found for Mr. McClelland. The Department of Interior appealed to the ARB, which reversed and upheld the removal.

Id. Mr. McClelland brought the case to district court, which upheld the removal and that the report was protected from disclosure by exceptions to the Freedom of Information Act ("FOIA"). *Id.* at 1285.

The U.S. Court of Appeals for the D.C. Circuit, however, found the district court's reliance on FOIA was misplaced. *McClelland*, 606 F.2d at 1285. The court looked to "traditional discovery doctrines as applied to agency proceedings"—i.e., the rules of the agency and the dictates of due process. *Id*. The D.C. Circuit found the report "uniquely relevant" to Mr. McClelland's case, as it concerned management practices that could shed light on the validity of Mr. McClelland's claims and the FEAA's finding the transfer was pretext to get rid of him. *Id.* at 1286. Namely, the report might have identified prospective witnesses or led to additional evidence to support the claim. *Id.* Moreover, the report stemmed from the administrative hearing before the Department of Interior ALJ, who recommended the investigation, and thus it was "reasonable to infer that he was prompted to do so by evidence supportive of [Mr. McClelland's] claim." *Id.* The court warned: "Depending on what the report shows, to deny appellant access to the results of that investigation could do violence to our conception of fair procedure and due process." *Id*.

Here, like *McClellan*, the Licensee suffered the most severe government deprivation—termination of its ability to exist by the revocation of its license—and the Fourth District Court of Appeal decision, affirming that deprivation and the mechanisms leading to it, is

flatly contrary to due process. As part of discovery, Licensee RCHH sought information into why RCHH was given inaccurate assurances that restoring power to the AC was a priority when nothing was being done. R.439–56, 672–79. The ALJ precluded both the discovery and consideration of evidence showing the resident deaths were caused by the failures of others to take promised, responsive action on which RCHH reasonably relied. *Id.* RCHH also sought evidence to demonstrate that the tragedy was caused by the failures of Florida's emergency management system and that similar scenarios played out in multiple other nursing homes so that RCHH could present its defense that it had not been negligent—that it had not violated the standard of care—and that it had not been an anomaly among nursing homes in this extreme natural disaster. R.439–56, 672–79. The ALJ prohibited discovery of that evidence analyzing state-wide death data of nursing home residents, records from the Executive Office of the Governor pertaining to the prioritization of the restoration of power to healthcare facilities, reports of other Florida nursing homes that lost power during the Hurricane and the conditions and deaths at those facilities, records on the investigation of deaths at RCHH by the Attorney General's Office at Florida nursing homes, and records of investigations into FP&L's restoration actions and priorities. *Id.*

Further, the Agency even worked with law enforcement to elicit testimony harmful to RCHH and share witness statements, while exculpatory evidence was withheld from RCHH. RCHH was denied access to

statements and Lt. Devlin refused to answer RCHH questions numerous times at deposition, failed to produce RCHH requested documents, and refused to answer numerous RCHH questions at final hearing. *See* R.1326, 1341–42, 1366–67, 1376, 24171–76, 24200; T.829–32, 886–87.

Like *McClelland*, many of these records were potentially exculpatory and rebuttal evidence (thus the opposition to voluntarily release them) and were internal documents that Licensee RCHH had no other way of discovering. The records potentially included evidence going to the issues that should have been meaningfully considered at the hearing—that RCHH was neither the cause of the damages to the residents nor an anomaly in the face of unprecedented events after Hurricane Irma.

These repeated refusals of causation and mitigating discovery on central issues violated the process statutorily due RCHH. *See Long v. Gill*, 981 F. Supp. 2d 966 (D. Or. 2013) (following *Mathews*, 424 U.S. at 334, and *Mullane*, 339 U.S. at 313, to hold motorist was denied due process where testimony of deputy (unsigned written narrative) did not meet Oregon's statutory requirement that the deputy appear in person or through an affidavit and where there was no opportunity for motorist to present information regarding the reasonableness of the seizure of his car under the circumstances); *Chestnut v. Sch. Bd.*, 378 So. 2d 1237, 1238 (Fla. Dist. Ct. App. 1979); *see also Maul*, 668 P.2d at 937 (Board of Dental Examiners violated statutory scheme by participating jointly with hearing

officer in conducting proceedings by using hearing officer as legal advisor during deliberations and in entering initial fact-finding decision; showing of prejudice not required when board fails to observe statutory duties); *cf. Ocasio v. Ashcroft*, 375 F.3d 105 (1st Cir. 2004) (noting an outer limit of due process that INS may not use affidavit of an absent witness unless it first establishes it was unable to secure witness's presence, but denying petition because petitioner failed to raise her objection at her deportation proceeding). RCHH was defenseless against the attacks lodged through law enforcement and was left unable to present the rebuttal it had a due process right to present for consideration. *Compare Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1420, *opinion modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994) (reversing and remanding for new trial where relevant evidence was excluded), *with Jones Total Health Care Pharmacy, LLC*, 881 F.3d at 834–35 (no prejudice from denial of discovery where petitioner was able to "fully cross-examine the expert about her testimony and the basis of her opinion").

B. The process due the Licensee included the right to have the issue of causation presented and considered at the hearing. The issue of causation required that the ALJ and the Agency consider the causes of the harm and factors of mitigation. Refusal to do so deprived the Licensee of due process. The decision affirming that conflicts with due process precedent.

The ALJ rejected consideration of third-party conduct as the cause of the damage suffered by these residents, concluding that such causation evidence was "not relevant." Yet, none of the statutory provisions AHCA charged were strict-liability provisions, wherein the violations of the statutes resulted in the penalty of permanent revocation. License revocation by statutory law is "appropriate only where those who by their conduct have forfeited their right to the privilege, and then only upon clear and convincing proof of *substantial causes* justifying the forfeiture." *Ferris v. Turlington*, 510 So. 2d 292, 294–95 (Fla. 1987) (quoting *Reid v. Florida Real Estate Commission*, 188 So. 2d 846, 851 (Fla. Dist. Ct. App. 1966)) (emphasis added). There was no consideration of the substantial causes of the damages justifying the forfeiture. No consideration of whether the outcome was unavoidable. No consideration of whether there were events that could not have been foreseen and forestalled. No consideration of third-party fault or responsibility. No consideration of mitigating evidence of the practices and circumstances at other nursing homes facing similar problems,

including those who also suffered patient deaths. *See* § 400.141(1)(h), Fla. Stat.; § 400.022(1)(l); §§ 400.102(1) and (4), Fla. Stat.; §§ 400.121(1), (3)(c), Fla. Stat.; 408.815(1)(b)-(e), Fla. Stat.

The ALJ rejected any consideration of mitigating evidence, such as the absence of specific standards of care addressing emergency disaster situations and heat hazards in such emergency disaster situations or RCHH's reasonable reliance on FP&L and Florida emergency department assurances that help was on the way. By statutory mandate, "[t]he licensee" is entitled to "present factors in mitigation of revocation, and the agency may make a determination not to revoke a license based upon a showing that revocation is inappropriate under the circumstances." §400.121(3). This mandate is not a debatable point. The Florida Legislature expressly clarified its intent in enacting § 400.022 when it amended § 400.023(2) to provide that violating § 400.022, without considering the substantial cause of the injury or deficiency, would not rise to the level of *ipso facto* negligence per se:

> Nothing in this part shall be interpreted to create strict liability. A violation of the rights set forth in section 400.022 or in any other standard or guidelines specified in this part or in any applicable administrative standard or guidelines of this state or a federal regulatory agency shall be evidence of negligence *but shall not be considered negligence per se*.

Chapter 2001-45, § 4, Laws of Florida (emphasis added) (as quoted in *Estate of Vazquez v. Avante Grps., Inc.*, 880 So. 2d 723, 726 (Fla. Dist. Ct. App. 2004)).

The Agency's switch from negligence causation to strict liability was a denial of due process, in conflict with the notice principles required by the Constitution. This Court and multiple circuit courts have recognized this as the law. In *Bell v. Burson*, 402 U.S. 535, 541 (1971), for example, this Court rejected the State of Georgia's position that it did not need to provide a hearing on liability before suspending a person's driver's license because fault and liability are irrelevant to Georgia's Motor Vehicle Safety Responsibility Act. The Act provided that the registration and driver's license of an uninsured motorist involved in an accident shall be suspended unless the motorist posts security to cover the amount of damages claimed by an aggrieved party in an accident report. *Bell*, 402 U.S. at 535. The administrative hearing conducted before the suspension excluded consideration of the motorist's fault or liability for the accident. *Id.* at 535. Paul Bell, a clergyman facing suspension after a young girl rode her bike into the side of his car, challenged the process. *Id*. at 537–38.

The Supreme Court held that it was the Georgia statute's requirement for only uninsured motorists involved in accidents, rather than all uninsured motorists, that implicated the procedural due process required by the Fourteenth Amendment. *Bell*, 402 U.S. at 539. The Court then turned to the nature of the procedure that is due the licensee on the question of his

fault or liability for the accident. *Id.* at 539–40. The Court looked at the substance of the statutory scheme and the purpose of the Georgia statute, which was "to obtain security from which to pay any judgments against the licensee resulting from the accident." *Id.* at 540. The Court held "that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee." *Id.* at 540. Thus, it was clear that "liability, in the sense of an ultimate judicial determination of responsibility, plays a crucial role in the Safety Responsibility Act." *Id.* at 541. For instance, an adjudication of nonliability or release would lift the suspension and the act's exceptions reflected liability-related concepts. *Id.* at 541. Also important, the Court noted the absence of strict liability in *Bell*—"we are not dealing with a no-fault scheme." *Id.* Because "the statutory scheme makes liability an important factor in the state's determination to deprive an individual of his licenses, the state may not, consistently with due process, eliminate consideration of that factor in its prior hearing." *Id*.

Even more compelling than *Bell*, the wrong here does not even require interpretation of this statutory scheme. That is, the Florida Legislature has expressly stated it did not intend strict liability for these statutory violations. Further, Florida courts recognize that, because revocation is penal in nature, such "penal sanctions should be directed only toward those who by their conduct have forfeited their right to the privilege, and then only upon clear and convincing proof of

substantial causes justifying the forfeiture." *Ferris v. Turlington*, 510 So. 2d 292, 294–95 (Fla. 1987) (quoting *Reid v. Florida Real Estate Commission*, 188 So. 2d 846, 851 (Fla. Dist. Ct. App. 1966) (italics in original)); *see also Evans Packing Co. v. Dep't of Agric. & Consumer Servs.*, 550 So. 2d 112 (Fla. Dist. Ct. App. 1989); *Hoover v. Ag. for Health Care Admin.*, 676 So. 2d 1380 (Fla. Dist. Ct. App. 1996); *Bridlewood Grp. Home*, 136 So. 3d 652; *Pic N' Save, Inc. v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco*, 601 So. 2d 245, 250 (Fla. Dist. Ct. App. 1992). Licensee RCHH had, and was denied, its statutory right to present and have considered mitigating evidence, § 400.121, Fla. Stat., which right the ALJ and the Agency rendered meaningless.

C. The process due the Licensee included the right to be informed of the issues on which the Agency's decision would turn and the standard by which those issues would be judged. The imposition of strict liability at the hearing, contrary to the allegations in the administrative complaint and the governing statute, denied the Licensee of these rights. The decision affirming that conflicts with due process precedent on this subject.

The imposition of strict liability at the hearing was not included in the administrative complaint, and that denied due process in conflict with the fundamental notice principles that this Court has made clear are mandatory. *Carey v. Piphus*, 435 U.S. 247 (1978);

Goldberg v. Kelly, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). Multiple circuit courts have followed those principles, including the U.S. Court of Appeals for the Sixth Circuit. In *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971), the Sixth Circuit held due process was denied where counsel dropped three theories of the case before the hearing and reformulated his case. *See Bendix*, 450 F.2d at 535–36. The hearing examiner rejected each of these theories, but the agency, the Federal Trade Commission, found against Bendix Corporation on the basis of an entirely separate theory of illegality. *Id.* The Commission's action was held to have violated the notice provision of the Administrative Procedure Act because the new theory "was never charged, raised, nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner; and not raised as an issue or discussed by Complaint Counsel in the appeal to the Commission from the order of the Hearing Examiner dismissing the Complaint." *Bendix* at 537; *see Rodale Press, Inc.*, 407 F.2d at 1256–57; *NLRB v. Johnson*, 322 F.2d 216, 219–20 (6th Cir. 1963); *NLRB v. H. E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962).

The decision here conflicts with the above principles of law. Florida statutes and rules give the licensee an opportunity to show causation, compliance with the law, and mitigating evidence before a license is revoked, and licensees rely on those laws and rules. *See also* discussion under B, *supra.* By the statutory and

judicial decisional law discussed above, the Agency had to prove Licensee RCHH was at fault due to the licensee's *own* negligence, *own* intentional wrongdoing, or *own* lack of due diligence, as noticed in the administrative complaint. Indeed, the "disputed issues of fact" that RCHH outlined in its filings further showed that RCHH was on notice of and was seeking to prepare for a hearing that was supposed to be focused on causation, fault, and mitigation. R.130–32; § 400.022, Fla. Stat. (when it amended § 400.023(2)); *Ferris v. Turlington*, 510 So. 2d 292, 294–95 (Fla. 1987). This Agency charged on one theory and then found and ruled on another—a strict liability standard about which the subject Licensee did not have notice, let alone meaningful, and against which it was not adequately prepared to defend. The final order and the decision affirming it are contrary to the laws, and they approve the taking of property without due process of law.

CONCLUSION

The ultimate question of due process in administrative proceedings is not about perfection, but the absolute right to fair play. It is axiomatic that a hearing "must be a real one, not a sham or pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). This case against the Licensee was over before it began. In the vortex of strong political winds and symbolic "grandstanding," Licensee RCHH's due process rights were violated, in conflict with the Constitution and the precedent of this Highest Court and the Circuit Courts of Appeals.

For these reasons, certiorari jurisdiction should be granted.

Respectfully submitted,

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